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No. 04-819

In The

Supreme Court of the United States

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Cross-Petitioner,

v.

UNITHERM FOOD SYSTEMS, INC.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should appellate review of antitrust standing be based on allegations in the pleadings instead of the evidence at trial?

2. Is a party moving to dismiss for lack of antitrust standing obligated to comply with the requirements of Rule 50 of the Federal Rules of Civil Procedure to preserve its rights on appeal?

3. If Rule 50 does apply, is it necessary, to fully preserve the moving party's rights on appeal, to renew, post-verdict under Rule 50(b), a pre-verdict motion under Rule 50(a)?

PARTIES TO THE PROCEEDING

Cross-Petitioner herein, and Appellant-Defendant below, is Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods ("ConAgra"). Cross-Respondent herein, and Appellee-Plaintiff below, is Unitherm Food Systems, Inc. ("Unitherm"). An additional plaintiff in the case before the United States District Court for the Western District of Oklahoma is Jennie-O Foods, Inc.

RULE 29.6 STATEMENT

ConAgra's parent company is ConAgra Foods, Inc., which is a publicly traded company that owns more than 10% of ConAgra's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	3
1. THE FEDERAL CIRCUIT SHOULD NOT HAVE VACATED THE JUDGMENT AND REMANDED AFTER FINDING THAT THE EVIDENCE WOULD NOT SUPPORT ANTITRUST STANDING	3
2. THE FEDERAL COURT HAS IMPROPERLY DEPARTED FROM THE DE NOVO STANDARD OF REVIEW OF THE EVIDENCE	7
3. THE FEDERAL CIRCUIT HAS IMPROPERLY APPLIED RULE 50 TO ITS DETERMINATION OF STANDING	9
4. A MOTION UNDER RULE 50(b) IS NOT REQUIRED TO FULLY PRESERVE RIGHTS TO APPEAL IF A MOTION UNDER RULE 50(a) HAS BEEN MADE	14
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Ashley Creek Phosphate Co. v. Chevron USA, Inc.,
315 F.3d 1245 (10th Cir. 2003) 5, 11

Associated Gen. Contractors v. California State Council of Carpenters,
459 U.S. 519 (1983) 8

Biodex Corp. v. Loredan Biomedical, Inc.,
946 F.2d 850 (Fed. Cir. 1991) 15

Bodie-Rickett and Assoc. v. Mars, Inc.,
957 F.2d 287 (6th Cir. 1992) 11

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 8

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1976) 7, 8, 12

Business Guides, Inc. v. Chromatic Comms. Enters., Inc.,
498 U.S. 533 (1991) 14

Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104 (1986) 7, 8, 12

Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212 (1947) 18

Eastman Kodak Co. v. Image Technical Servs.,
504 U.S. 451 (1992) 5

Fund for Animals v. Babbitt,
89 F.3d 128 (2d Cir. 1996) 11

FW/PBS v. City of Dallas,
493 U.S. 215 (1990) 13

Geddes v. Northwest Mo. State Univ.,
49 F.3d 426 (8th Cir. 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Globe Liquor Co. v. San Roman,
332 U.S. 571 (1948) 10, 18

IBM v. Edelstein,
526 F.2d 37 (2d Cir. 1975) 15

Indium Corp. of Am. v. Semi-Alloys, Inc.,
781 F.2d 879 (Fed. Cir. 1985) 8

Johnson v. New York, N.H. & H.R. Co.,
344 U.S. 48 (1952) 18

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 5

MDPhysicians & Assoc., Inc. v. State Bd. of Ins.,
957 F.2d 178 (5th Cir. 1992) 9

Mortensen v. First Fed. Sav. and Loan Ass'n,
549 F.2d 884 (3d Cir. 1977) 9

Motive Parts Warehouse v. Facet Enters.,
774 F.2d 380 (10th Cir. 1985) 5

Neely v. Martin K. Eby Constr. Co.,
386 U.S. 317 (1967) 10, 11

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 7

NOW v. Scheidler,
510 U.S. 249 (1994) 13

Ortloff v. United States,
335 F.3d 652 (7th Cir. 2003) 12

Park v. Forest Serv. of the United States,
205 F.3d 1034 (8th Cir. 2000) 11

Pederson v. Louisiana State Univ.,
213 F.3d 858 (5th Cir. 2000) 11

TABLE OF AUTHORITIES – Continued

Page

R.C. Dick Geothermal Corp. v. Thermogenics, Inc.,
890 F.2d 139 (9th Cir. 1989) 11

Railroad Dynamics, Inc. v. A. Stucki Co.,
727 F.2d 1506 (Fed. Cir. 1984) 15

Rite-Hite Corp. v. Kelley Co., Inc.,
56 F.3d 1538 (Fed.Cir. 1995) 11

Sandusky County Democratic Party v. Blackwell,
387 F.3d 565 (6th Cir. 2004) 11

Schlitt v. Florida,
749 F.2d 1482 (11th Cir. 1985) 12

Shaw v. Hunt,
154 F.3d 161 (4th Cir. 1998) 11

Skwira v. United States,
344 F.3d 64 (1st Cir. 2003) 9

Sports Racing Servs. v. Sports Car Club of Am.,
131 F.3d 874 (10th Cir. 1997) 8

Steel Co. v. Citizens for a Better Env.,
523 U.S. 83 (1998) 7

Steir v. Girl Scouts of the USA,
383 F.3d 7 (1st Cir. 2004) 11

U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.,
487 U.S. 72 (1988) 13

U.S. v. 5 S 351 Tuthill Road,
233 F.3d 1017 (7th Cir. 2000) 11

United States v. 5000 Palmetto Drive,
928 F.2d 373 (11th Cir. 1991) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Contents of Accounts Nos. 3034504504 and 144-07143, 971 F.2d 974 (3d Cir. 1992) 11

United States v. Hays, 515 U.S. 737 (1995) 7, 13

Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP, 54 U.S. 398 (2004) 4

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1295(a) 4

Fed.R.Civ.P. 1 17

Fed.R.Civ.P. 7 17

Fed.R.Civ.P. 50 ..... *passim*

Fed.R.Civ.P. 83(a)(2) 16

Fed.R.Civ.P. 83(b) 16

OTHER AUTHORITIES

15 James Wm. Moore et al., Moore's Federal Practice, § 101.30 (3d ed. 2004) 11

9 James Wm. Moore et al., Moore's Federal Practice, § 50.05 (3d ed. 2004) 11

14 James Wm. Moore et al., Moore's Federal Practice, § 83.31 (3d ed. 2004) 16

TABLE OF AUTHORITIES – Continued

Page

15 James Wm. Moore et al., Moore's Federal Practice, § 101.61 (3d ed. 2004) 8

Robert L. Haig et al., Business and Commercial Litigation in Federal Courts § 24.5(b) 16

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 375 F.3d 1341. (Appendix A to Petition of Unitherm ["App. A"], 1a-54a.)

JURISDICTION

The Federal Circuit's opinion and order was entered on July 12, 2004. Timely Petitions for Panel Rehearing and Rehearing En Banc were denied on September 14, 2004 (Appendix B to Petition of Unitherm, 55a-56a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Conditional Cross-Petition is filed pursuant to United Supreme Court Rule 13.4 in connection with a petition for writ of certiorari filed by Unitherm with a date of docketing of November 4, 2004.

STATUTES INVOLVED

This Cross-Petition involves Rule 50 of the Federal Rules of Civil Procedure. (Appendix C to Petition of Unitherm, 57a-60a.)

STATEMENT OF THE CASE

The Federal Circuit Court of Appeals correctly determined that Unitherm, the plaintiff below, had not introduced the necessary evidence of standing, particularly antitrust injury, but then it inexplicably ignored its own

review of the evidence and looked to the ***pleadings*** alone to support a conclusion that standing had, in fact, been established after all. Instead of dismissing the antitrust count, the Federal Circuit then turned to a procedural question that should never have been reached: whether the issue of sufficiency of the evidence to sustain a jury verdict had been preserved for purposes of appeal under Rule 50. Applying Tenth Circuit law, the Federal Circuit held that, although there had been a proper pre-verdict motion under Rule 50(a), the absence of a post-verdict motion under Rule 50(b) precluded a reversal. The antitrust claim was, therefore, remanded.

Since standing is a matter of law and cannot be waived, Unitherm's antitrust count should have been dismissed once the court concluded that the evidence did not support standing. Contrary to the views expressed by the Federal Circuit, the procedural requirements of Rule 50 – which apply to a determination of whether there was sufficient evidence to support a jury verdict – were not implicated. Standing was never a jury question to begin with. Thus, no Rule 50 motions, pre- or post-verdict, were needed to preserve the full range of options available to ConAgra on appeal.

Even if this Court should conclude that Rule 50 does apply to the issue of antitrust standing, the rule has been applied incorrectly. A pre-verdict motion under Rule 50(a) fully preserves the moving party's rights on appeal. A post-verdict renewal of the Rule 50(a) motion under Rule 50(b) is ***permissive***. The Federal Circuit, therefore, should have reversed, not remanded, based on ConAgra's pre-verdict Rule 50(a) motion.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT SHOULD NOT HAVE VACATED THE JUDGMENT AND REMANDED AFTER FINDING THAT THE EVIDENCE WOULD NOT SUPPORT ANTITRUST STANDING.

Unitherm, a manufacturer of food processing equipment, sued ConAgra, a food processor, alleging violation of Section 2 of the Sherman Act. Unitherm's theory was that ConAgra had obtained a patent by fraud and then attempted to monopolize an alleged relevant market that was coterminous with the food browning process claimed in the patent. ConAgra argued, *inter alia*, that Unitherm had not suffered any antitrust injury, and hence, lacked antitrust standing. (App. A, 42a.) The jury reached a verdict in Unitherm's favor on the Sherman Act count. ConAgra did not renew its motion to dismiss in a ***post-verdict*** motion for JMOL under Rule 50(b).

There is no room for doubt that Unitherm failed to prove antitrust standing. The jury was instructed that Unitherm "asserts the relevant market consists of the browning process defined in the '027 patent," and Unitherm made no objection to this instruction. (App. A, 10a.) Unitherm admitted, however, that there had never been a transaction in this process market, or in the broader market for browning processes generally. (App. A, 48a.) Moreover, there was no competition whatsoever between Unitherm and ConAgra. (App. A, 47a-48a.) Unitherm sold food processing equipment, while ConAgra sold food products. (App. A, 3a, 4a.)

The entire basis for Unitherm's Sherman Act claim was that letters written by ConAgra offered a license under a fraudulently obtained patent to its competitors

(other sellers of food products). The evidence was uncontroverted that no one expressed an interest in a license, much less accepted a license, and no competitor of ConAgra testified that it refrained from using the patented process because of ConAgra's conduct. (App. A, 48a.) No one testified that sales of any food products, whether or not browned by the patented process, were lost as a result of ConAgra's conduct. (*See*, App. A, 50a.)

In addition to finding for Unitherm on the antitrust count, the jury found for Unitherm on the state law count for interference with prospective economic advantage. Actual damages based on this claim were assessed at $2,000,000, to which an equal amount of punitive damages was added. The Federal Circuit let this award stand. Thus, Unitherm was generously compensated for any harm to it, and ConAgra does not contest that award. It is only the antitrust count that is the subject of this Cross-Petition.

Unitherm's lack of antitrust standing was raised in ConAgra's appeal to the Federal Circuit, which had jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a). The Federal Circuit said:

> ConAgra appeals the jury's antitrust verdict, claiming that Unitherm did not produce evidence sufficient to support findings of a relevant antitrust market, a dangerous probability of success, ***antitrust injury, or standing*** – all critical elements of a § 2 attempted monopolization claim. *See generally Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 54 U.S. 398, 124 S.Ct. 872 (2004).

(App. A, 27a, emphasis added.)

The Federal Circuit began its analysis by correctly noting that, under Tenth Circuit law, antitrust standing is a question of law subject to *de novo* review that requires review of the evidence supporting its factual elements.[1] (App. A, 13a.) The Federal Circuit acknowledged that "antitrust injury" was an essential element of "antitrust standing:"

> For Unitherm to possess antitrust standing under Tenth Circuit law, it must demonstrate that ConAgra's behavior caused it to suffer an "antitrust injury." *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1252 (10th Cir. 2003).

(App. A, 43a.) After reviewing the evidence in the record, the Federal Circuit concluded:

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[1] The court said:

> The Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to de novo review. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1253-1254 (10th Cir. 2003); *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389 (10th Cir. 1985). Market definition and antitrust injury, on the other hand, are intensely factual determinations. *See e.g., Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482 (1992) ("The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-586 (1986) ("To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury."). ***We must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.***

(App. A, 13a-14a, emphasis added.)

> In short, Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little else to support any other aspect of its Section 2 claim.

(App. A, 50a.)

> In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept either its proposed market definition or ***its demonstration of antitrust injury***.

(App. A, 44a, emphasis added.)

Notwithstanding its recognition of Unitherm's failure to prove antitrust injury, an essential element of antitrust standing, the Federal Circuit nevertheless found that Unitherm ***did*** have antitrust standing. It erroneously reached this conclusion by looking not to the evidence but the ***pleadings***: "Unitherm's ***allegations***" met the applicable standard for determining antitrust standing.[2] Thus, the Federal Circuit did not apply a *de novo* standard to a review of the ***evidence*** of antitrust standing as it had

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[2] In the case below, the Federal Circuit said:

> Unitherm's ***allegations*** met all six of the Tenth Circuit's enumerated factors: (1) ConAgra's attempts to block the "Unitherm process" by enforcing the '027 Patent caused Unitherm to lose prospective sales; (2) ConAgra's fraud of the PTO demonstrated improper intent; (3) Antitrust laws provide remedies for competition reduced in a relevant antitrust market, which Unitherm pled; (4) Enforcement of a patent right directly reduces competition; (5) A lost-sales analysis could, in theory, measure the harm; and (6) Damage calculations should be neither unusually complex nor duplicative. The district court was therefore correct in ruling that Unitherm had antitrust standing and in allowing its action against ConAgra to proceed.

(App. A, 44a, emphasis added.)

earlier concluded it must do. (App. A, 13a-14a, 44a.) Instead, the Federal Circuit applied a "sufficiency of the evidence" standard, found that the evidence supporting antitrust liability was insufficient, and remanded the action for a new trial. (App. A, 50a-51a, n.7.)

2. THE FEDERAL COURT HAS IMPROPERLY DEPARTED FROM THE *DE NOVO* STANDARD OF REVIEW OF THE EVIDENCE.

Standing to sue is a necessary element of the subject matter jurisdiction of federal courts. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 101 (1998) (suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit). The evidence necessary to establish an Article III "case or controversy" must, at a minimum, prove the following elements: (1) an injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury can be redressed by a favorable ruling. *United States v. Hays,* 515 U.S. 737, 742 (1995); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 663-665 (1993).

Where the plaintiff seeks redress under the federal antitrust statutes, its showing of standing also must include proof of an "injury causally linked" to conduct that violates the antitrust laws, that is, "'plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 109 (1986) (emphasis in original) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1976)).

> An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . Factors to consider in evaluating antitrust standing include: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

Sports Racing Servs. v. Sports Car Club of Am., 131 F.3d 874, 882 (10th Cir. 1997) (internal citations and quotations omitted); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985); *see generally Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534-45 (1983). This requirement of "antitrust injury" exists because "'the antitrust laws . . . were enacted for the protection of *competition*, not *competitors*.'" *Cargill*, 479 U.S. at 110 (quoting *Brunswick*, 429 U.S. at 488 [quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)]). "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional requirement of injury in fact, but the court must make a further determination whether the plaintiff is a ***proper party*** to bring a private antitrust case." 15 James Wm. Moore et al., Moore's Federal Practice, § 101.61, 101-22 (3d ed. 2004) (emphasis added) (citing *Associated Gen. Contractors*, 459 U.S. at 535, n.31).

By basing its conclusion that antitrust standing had been established on ***allegations*** instead of ***evidence***, the

Federal Circuit proceeded in a manner that cannot be reconciled with these precedents.

3. THE FEDERAL CIRCUIT HAS IMPROPERLY APPLIED RULE 50 TO ITS DETERMINATION OF STANDING.

Not every question that involves a review of the evidence is subject to the standards that apply to jury determinations under Rule 50(a). The federal courts have broad power to weigh evidence and resolve factual issues to determine whether plaintiffs have carried their burden of proving standing and other aspects of jurisdiction.[3] The Federal Circuit's decision below, however, rejected this basic principle announced in many of this Court's precedents and declined to act based on its own review of the

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[3] For example, the First Circuit has stated:

> In a situation where the parties dispute the predicate facts allegedly giving rise to the court's jurisdiction, the district court will often need to engage in some preliminary fact-finding. In that situation, the district court "enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction." In such a case, the district court's findings of fact will be set aside only if clearly erroneous. The court's ultimate conclusion regarding the existence vel non of subject matter jurisdiction is a question of law subject to de novo review.

Skwira v. United States, 344 F.3d 64, 72-73 (1st Cir. 2003) (internal citations omitted), *cert. denied*, 124 S.Ct. 2836 (2004); *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977), *cert. denied*, 454 U.S. 897 (1981) ("the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case"); *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir.), *cert. denied*, 506 U.S. 861 (1992) (affirming dismissal for lack of subject matter jurisdiction based on the complaint, supplemented by undisputed facts and the court's resolution of disputed facts).

evidence. Remand for a re-trial before a jury of any issues related to the antitrust count was improper because Unitherm did not in the first trial establish a right to have the case submitted to the jury.

Long-standing precedents of this Court and the Circuit Courts of Appeals are inconsistent with the notion that the standards and procedures of Rule 50 generally applicable to a motion for JMOL should be applied to plaintiff's evidence of antitrust standing. We recognize that standing, like other jurisdictional issues, can be, and often is, raised as part of a Rule 50(a) motion at the close of the evidence or as part of a Rule 50(b) motion after the verdict. This is, however, merely a matter of convenience, not a requirement. Thus, in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 327 (1967), this Court recognized the important difference between a motion for JMOL based on sufficiency of the evidence, on the one hand, and jurisdictional matters, on the other. Justice White, writing for the majority, reasoned that questions such as improper jury instructions or erroneously excluded evidence,

> are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court.

Id. (citing *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574 (1948)). Justice White acknowledged that district courts have "no special advantage or competence" in dealing with questions of law reserved exclusively for the

court, and the defendant may raise such questions of law on appeal without having ever having raised those issues post-verdict. *Id.*

Although a determination of standing requires a court to review the evidence,[4] it is ultimately a question of law.[5] For this reason, standing can be, and often is, evaluated on motions for summary judgment.[6] The standing inquiry is thus analogous to other issues on which the ***court*** is the fact-finder, with the jury, if there is one, acting only in an advisory capacity. In these cases, Rule 50 has been held to be inapplicable.[7]

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[4] 15 James Wm. Moore et al., *supra*, § 101.30[1] ("reviewing a grant of summary judgment, the court need not accept the plaintiffs' alleged chain of events if they are unable to demonstrate ***competent evidence to support each link***," emphasis added).

[5] *See, e.g., Steir v. Girl Scouts of the USA*, 383 F.3d 7, 15 (1st Cir. 2004); *Fund for Animals v. Babbitt*, 89 F.3d 128, 132 (2d Cir. 1996); *United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974 (3d Cir. 1992), *cert. denied*, 507 U.S. 985 (1993); *Shaw v. Hunt*, 154 F.3d 161, 164 (4th Cir. 1998); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004); *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017, 1020 (7th Cir. 2000); *Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1036 (8th Cir. 2000); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 145 (9th Cir. 1989) (en banc); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d at 1253-1254 (Tenth Circuit opinion); *United States v. 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991); *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1551 (Fed.Cir.) (en banc), *cert. denied*, 516 U.S. 867 (1995).

[6] *See, e.g., Bodie-Rickett and Assoc. v. Mars, Inc.*, 957 F.2d 287, 290-291 (6th Cir. 1992) (summary judgment granted for lack of antitrust standing); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d at 1261 (same).

[7] *See* 9 James Wm. Moore et al., *supra* § 50.05[1] (courts have interpreted Rule 50(a) to mean that "motions for judgment as a matter of law are available only in civil cases tried by a jury with the power to

(Continued on following page)

This Court has reversed where evidence of antitrust injury was lacking, even in a case in which standing was ***not*** raised by any post-trial motion under Rule 50. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, *supra*, a post-trial motion under Rule 50 had been made, but the plaintiff's standing under the antitrust laws was not challenged. Nevertheless, this Court, upon reviewing the plaintiff's evidence of its damages (profits plaintiff would have earned in the absence of a merger assertedly violating the antitrust laws), concluded that no antitrust injury had been shown and vacated the judgment of the Court of Appeals. *Id.* at 490. Similarly, in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, *supra*, no post-trial motion had been made challenging the plaintiff's antitrust standing. This Court, however, examined the evidence offered by the plaintiff in support of two damages theories (the threat of lost profits stemming from the possibility that the merged firm would lower prices, and the threat of being driven out of business by prices below cost). This Court held: "[t]he record below does not support a finding of antitrust injury, but only of threatened loss from increased competition." *Id.* at 122. Judgment for the plaintiff was reversed, and the case was remanded for further proceedings consistent with the opinion. *Id.*

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return a binding verdict") and cases cited therein; *Ortloff v. United States*, 335 F.3d 652, 660 (7th Cir. 2003) (motion under Rule 50(a) is appropriate only in a jury trial, not a bench trial); *Geddes v. Northwest Mo. State Univ.*, 49 F.3d 426, 429, n.7 (8th Cir. 1995) (Rule 50 does not apply in case in which district court acted as finder of fact); *Schlitt v. Florida*, 749 F.2d 1482, 1483 (11th Cir. 1985) (Rule 50 does not apply to cases tried before a court with an advisory jury).

More importantly, any argument that a motion for JMOL under Rule 50 is prerequisite to appellate review of the sufficiency of the evidence of standing would contravene the doctrine that the federal courts have broad power to determine their own subject matter jurisdiction. *See e.g., U.S. Catholic Conf. v. Abortion Rights Mobiliz., Inc.*, 487 U.S. 72, 72 (1988) (district courts have "inherent and legitimate authority . . . to issue . . . binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter"). It is because standing is critical to the issue of subject matter jurisdiction that the absence of standing can be asserted for the first time on appeal.[8] Indeed, if the defect is never raised by the defendant, it can still be raised *sua sponte* by the reviewing court.[9]

The Federal Circuit decision below has set a very dangerous and unwise precedent. It radically changes the law by dispensing with *de novo* review and permits federal jurisdiction to be based on mere allegations of a complaint.

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[8] *See NOW v. Scheidler*, 510 U.S. 249, 254-255, *reh'g denied*, 114 S.Ct. 1340 (1994); *FW/PBS v. City of Dallas*, 493 U.S. 215, 229, 232 (1990) (raised sua sponte), *overruled on other grounds by* 124 S.Ct. 2219 (2004).

[9] *See United States v. Hays*, 515 U.S. 737, 742 (1995) (noting that "[t]he question of standing is not subject to waiver. . . . The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.") (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. at 230-31) (internal quotation marks omitted).

4. A MOTION UNDER RULE 50(b) IS NOT REQUIRED TO FULLY PRESERVE RIGHTS TO APPEAL IF A MOTION UNDER RULE 50(a) HAS BEEN MADE.

If this Court chooses to apply Rule 50(b), that rule should be interpreted in a manner that is not advanced by Unitherm, the Federal Circuit, or the Tenth Circuit. Rule 50(b) ***does not require*** a motion after the verdict to preserve the full range of rights on appeal when a pre-verdict motion has been made under Rule 50(a).

Rule 50(b) is relatively short, easily understood, and, like all Federal Rules of Civil Procedure, should be given its "plain meaning." *Business Guides, Inc. v. Chromatic Comms. Enters., Inc.*, 498 U.S. 533, 540 (1991). The rule provides that if a motion were made for judgment as a matter of law under Rule 50(a) before submission of the case to the jury, the movant "may" renew its motion "no later than 10 days after entry of judgment." It does not say that a party who chooses not to "renew" such a motion after the verdict thereby loses the right to appeal the denial of the Rule 50(a) motion.

Many motions can be, and are, renewed, i.e., the trial court is explicitly asked to consider the motion again. However, the fact that a motion is ***not*** renewed when the opportunity arises does not mean that the original motion can no longer serve as the basis for an appeal. Rule 50(b) offers no reason to suppose that a Rule 50(a) motion is to be treated differently from other motions in this respect. Rule 50(b) is permissive, not ritualistic; it simply provides a time period for the written renewal of a Rule 50(a) motion when the moving party desires to renew and argue the point again. We should not assume, however, that the moving party did not mean what it said the first time just

because it did not make the same motion again. In this case, ConAgra did move, under Rule 50(a), for dismissal of the antitrust claim at the close of the evidence and was not required to make that motion again under Rule 50(b) to preserve its right to appeal.

Unitherm may argue the 10-day limit on Rule 50(b) motions under Rule 50(b) somehow implies a loss of the right to appeal once that period has run. It does not. There must be a limit to the time for renewal of Rule 50(a) motions, after which the district court can enter judgment making the case ripe for appeal, but that does not imply that a properly made Rule 50(a) motion is nullified if it is not made again under Rule 50(b).

An argument has been advanced that a post-verdict Rule 50(b) motion is not only desirable, but, indeed, so desirable that a judge-made rule requiring such a motion should be grafted on to the otherwise explicit provisions of Rule 50(b). The theory is that the trial judge will inevitably benefit from this post-trial written presentation of the motion and the case will thus be better postured for appellate review. *See, e.g., Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859 (Fed. Cir. 1991) (citing *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed. Cir.), *cert. denied*, 496 U.S. 871 (1984)). The flaw in this argument is that such a "one size fits all" approach is both unnecessary and wasteful. Trial judges regularly instruct counsel that they do or do not want motions briefed, and this includes motions that may result in an appeal.[10] Indeed, when trial judges believe that briefs

[10] *IBM v. Edelstein*, 526 F.2d 37, 47 (2d Cir. 1975) (oral motions "are not only contemplated but, absent unusual circumstances,

(Continued on following page)

would be helpful, they have shown no hesitation to order that briefs should be filed, when such briefs should be filed, how long the briefs should be, what kind of paper the briefs should be printed on and what typeface should be used. *See, e.g.*, W.D. Okla. LCvR7.2(c) (length and format of briefs). If the trial judge does not get exactly what he or she wants, the motion can be, and sometimes is, denied on that basis alone. Fed.R.Civ.P. 83(a)(2) (willful failure to comply with local rules of form); Fed.R.Civ.P. 83(b); 14 James Wm. Moore et al., *supra*, § 83.31. There is no reason why trial judges cannot follow this practice when they believe that briefing of a Rule 50(a) motion that has been taken under submission might be beneficial. Moreover, the mere filing of written briefs is hardly a guarantee that the trial judge will explain his or her views of the matter more clearly than set forth earlier in the case.

This case illustrates the point perfectly. The issue of antitrust standing, including antitrust injury, was the subject of a fully-briefed motion for summary judgment as to both plaintiffs, Unitherm and Jennie-O (not a party to the appeal). The motion was granted as to Jennie-O, but denied as to Unitherm, and the reasoning of the District Court was set forth in a written opinion. (App. A, 9a.) The point was briefed again in ConAgra's pre-trial memoranda. During trial, the trial judge several times expressed her desire not to hear further about ConAgra's position on the deficiencies of the antitrust claim. That issue had been explored, the trial judge had made up her mind and explained her views, and ConAgra could appeal if it

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virtually mandated by Federal Rule 7(b)(1)."); *see also* Robert L. Haig et al., Business and Commercial Litigation in Federal Courts § 24.5(b).

wanted. Nothing more was needed or even helpful for proper appellate review.

In essence, Unitherm's argument is that for ConAgra to have preserved its right to appeal, it was required to engage in an empty formality: ConAgra had to make its motion to dismiss the antitrust claim twice. It had to explain for a second, third or fourth time why Unitherm, which is not a competitor of ConAgra in any market, lacked antitrust standing. Perhaps there would be some logic in requiring ConAgra to uselessly repeat its motion if such a requirement could be found in the Federal Rules of Civil Procedure, but it cannot be found in Rule 50(b) or anywhere else.

Rule 1 is in point. It provides that "these rules govern the procedures in the United States district courts . . . ," a statement that leads one to believe that once the Federal Rules have been fully complied with in both letter and in spirit, there are no remaining procedural obstacles to achieving basic justice, including appellate review. Rule 1 further says that the Rules "shall be construed and administered to secure the just speedy, and inexpensive determination of every action," a statement that is hardly reconcilable with the imposition of unneeded procedural barriers to appeal that are nowhere set forth in the Rules.

Rule 7 also bears on this point, providing that "[a]n application to the court for an order shall be by motion which, ***unless made during a hearing or trial***, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." (Emphasis added.) Since the motion *sub judice* was made during trial under Rule 50(a), it was fully effective under Rule 7 and thus preserved all of ConAgra's appellate

rights. If the trial court wanted written briefs on ConAgra's Rule 50(a) motion, it could have so ordered.

Even the older cases on which Unitherm relies held that a renewal of a pre-verdict motion was **not** required to preserve the right to a re-trial, only to preserve the right to a reversal.[11] It is time to revisit the question and hold that motions under the current Rule 50(b) are permissive and are not necessary to preserve rights of any kind on appeal.

CONCLUSION

Unitherm's antitrust claim should be dismissed for lack of antitrust standing. Alternatively, that claim should be dismissed because ConAgra's motion under Rule 50(a) for judgment as a matter of law should have been granted, the absence of a Rule 50(b) motion not being a bar to appellate review of a Rule 50(a) motion. Judgment for Unitherm should be entered, but based only on its Oklahoma state law

[11] This Court has, to be sure, visited this issue a half century ago, albeit when Rule 50 took a different form. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571; *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952). The Court took the position that, where substantial evidence did not support a judgment, but the defendant had failed to make a post-judgment motion for JNOV, the reviewing court could remand for a new trial but could not reverse the judgment. The views expressed in those cases were not, however, included in the current Rule 50, when it was completely rewritten and adopted by this Court in 1963.

claim, in the amount of $4,000,000, plus interest. The antitrust claim should be dismissed.

Respectfully submitted,

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